BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARTIN K. SMITH	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,048,115
USC, LLC	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appealed the March 1, 2011, Award entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Workers Compensation Board heard oral argument on June 22, 2011. Gary R. Terrill, of Overland Park, Kansas, has been appointed as a Pro Tem in this matter.

APPEARANCES

Mitchell W. Rice of Hutchinson, Kansas, appeared for claimant. Nathan D. Burghart of Lawrence, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a May 7, 2009, accident. In the March 1, 2011, Award, ALJ Sanders determined claimant sustained an accidental injury arising out of and in the course of his employment, and as a result of the accidental injury claimant has a 5% whole person functional impairment. Averaging claimant's 100% wage loss with an averaged 27.25% task loss, ALJ Sanders awarded claimant disability benefits for a 64% work disability and awarded claimant disability benefits for the same. At oral argument, the parties stipulated that if the Board finds claimant is credible, then Claimant has suffered a 100% wage loss and a 27.25% task loss for a 64% work disability.

Respondent alleges that claimant is not credible. Respondent's counsel believes the following statement contained in the ALJ's Award is a misinterpretation of *Bergstrom*[1]:

> Claimant has a one hundred percent wage loss. Respondent is urging that the holding in ***Bergstrom*** be disregarded because Claimant is not credible and is magnifying his symptoms to reap an unjust monetary award. The Supreme Court in ***Bergstrom*** makes no such exception. The Court is clear that if a Claimant has one hundred percent actual wage loss that is the wage loss for calculating permanent partial disability based on task loss and wage loss.[2]

In its brief to the Board, respondent states:

> [R]espondent asks that the Board determine whether a claimant who lacks credibility is entitled to work disability because of Bergstrom. Stated otherwise, the Board must determine whether a claimant's credibility is an issue that must be determined in addressing a claim for benefits under the Bergstrom decision. Respondent submits that, in the event that the Board agrees that credibility is a factor that must be considered, then this claimant has failed to meet his burden of proof and his claim for benefits must be denied due to his obvious lack of credibility.[3]

Respondent urges the Board find that claimant is not credible, and thus has failed to prove his entitlement to permanent partial disability benefits. If this claim is found to be compensable, respondent maintains claimant should not be awarded any permanent impairment or disability as the medical evidence does not confirm claimant has any permanent significant condition as a result of the alleged injury. In its application for review, respondent lists as an issue, "The claimant's credibility, including but not limited to, whether he has intentionally misrepresented his symptoms and alleged injury and how his lack of credibility should impact his workers compensation award."[4]

At oral argument, respondent's counsel raised a new issue. Respondent argues that K.S.A. 2011 Kansas Session Law, 44-510e(a)(2)(E)*,*[5] which became law on May 15, 2011, should be applied retroactively to this case. Respondent argues that the capability of claimant to earn post-injury wages should be considered in determining claimant's work

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[1] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[2] ALJ Award (March 1, 2011) at 6.

[3] Respondent's Brief at 4 (filed April 19, 2011).

[4] Application for Review (Mar. 9, 2011) at 1.

[5] The Kansas Legislature enacted Substitute House Bill 2134, which is contained in the 2011 Kansas Session Laws, Chapter 55. All references herein are to K.S.A. 2011 Kansas Session Laws 44-510e(a)(2)(E), which amended K.S.A. 44-510e(a)(2)(E) and became law on May 15, 2011.

disability. Claimant contends that K.S.A. 2011 Kansas Session Laws, 44-510e(a)(2)(E*)* should not be applied retrospectively to his claim. Claimant asserts the factual findings are supported by substantial evidence and should be affirmed. Claimant requests the Board affirm the March 1, 2011, Award in all respects.

The issues before the Board on this appeal are:

1. Whether claimant suffered a back injury by accident arising out of and in the course of his employment;

2. If so, what is the nature and extent of claimant's disability?;

3. Whether claimant is entitled to work disability benefits;

4. Whether K.S.A. 2011 Kansas Session Laws 44-510e(a)(2)(E) should be retrospectively applied to this claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant is 31 years old, completed the 11th grade and recently completed his GED. In the fifteen years prior to the accident that gave rise to this claim, claimant worked for approximately 43 different employers. While working for respondent, claimant was a welder, and built seed wheels. Claimant previously worked for respondent, but quit for approximately six weeks. He was rehired by respondent in April 2009.

On May 7, 2009, after claimant completed a welding job, he set his jig on the floor next to a wall. Someone yelled causing him to jump up. As claimant jumped, his lower left back struck a metal circuit breaker box. Claimant received a scratch 1 to 1 ½ inches long on his lower back, and also suffered a bruise 3 inches in diameter. Claimant immediately reported the accident to his supervisor. He finished working the rest of the day, but did leave early.

Five days after the accident, respondent referred claimant to Dr. Christian Tramp, the company physician. Claimant complained of severe pain in his lower back and numbness and tingling in his left leg. A CT scan of claimant's abdomen and pelvis was performed to rule out kidney damage, as claimant also reported blood in his urine.

After his accident, claimant briefly returned to work for respondent as a receptionist. Respondent employed claimant as a receptionist, because it was within temporary restrictions given to him by his doctors. Claimant indicated he worked as a receptionist for

two to three weeks, but quit showing up for work because he was harassed daily by the owners and his coworkers. Claimant has not worked since quitting the receptionist job.

Claimant indicated that before this accident, he had no problems with his back or spine. He testified that prior to his accident, he had never seen a doctor or chiropractor for back problems or had an x-ray, MRI or CT scan of his spine.

On May 18, 2009, claimant again saw Dr. Tramp. Jennifer Poe[6] was present at the appointment. Claimant was advised by Dr. Tramp to use anti-inflammatory drugs and Lortab. Claimant indicated that he got into a heated disagreement about his injury with Dr. Tramp and Ms. Poe. According to claimant, Dr. Tramp and Ms. Poe insisted there was nothing wrong with him, and that he was lying about his injury. Claimant indicated that Dr. Tramp and Ms. Poe also alleged his back and leg problems were not caused by the work-related accident.

At the request of Dr. Tramp, claimant underwent a lumbar MRI on May 19, 2009. On June 12, 2009, Dr. Tramp diagnosed clamant with low back pain, and left lower extremity radiculopathy from L4-5 disc herniation.[7] Dr. Tramp referred claimant to Dr. Terrence Pratt, a specialist in physical medicine and rehabilitation.

Claimant was first examined by Dr. Pratt on July 8, 2009. Dr. Pratt reviewed the May 19, 2009 MRI report, which indicated mild spondylosis at L3-4 and L4-5 with disc bulging. He also indicated claimant had unverifiable radicular symptoms, and no disc herniation.[8] Dr. Pratt recommended a pain management consultation to consider lumbar epidural steroid injections.

After three epidural steroid injections, claimant returned to see Dr. Pratt on August 24, 2009. Claimant indicated that after the first two injections he had an increase in pain symptoms and a third injection provided no benefit. Dr. Pratt referred claimant to Dr. Paul Arnold, a neurosurgeon, for a surgical consultation. Dr. Arnold determined that claimant was not a viable surgical candidate because there was no evidence of neurological compromise or radiculopathy.[9]

Dr. Pratt performed Waddell's testing on claimant, which gives an indication of a functional overlay or inappropriateness on the examination. Waddell's testing consists of five separate tests. In four out of five tests, Dr. Pratt determined claimant responded

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[6] Ms. Poe is an employee of respondent who works in Human Resources.

[7] Pratt Depo. at 24.

[8] *Id*. at 24-25.

[9] Fevurly Depo. at Ex. 2 at 5 (Dr. Fevurly's Dec. 10, 2010 IME Report).

inappropriately. Stated another way, Waddell's testing indicated that claimant made physical complaints that should not be present.[10]

Dr. Pratt also testified that striking a left flank area on a breaker box is not going to cause degenerative disc disease, and that claimant's symptoms appear in excess of the findings. He indicated the MRI findings did provide the medical basis for the subjective complaints claimant made.[11] However, Dr. Pratt opined that he could not attribute any of the MRI findings to the incident that occurred on May 7, 2009.[12] Dr. Pratt testified that claimant's work injury may have aggravated his symptoms, but there was no structural change.

Claimant was referred by Dr. Pratt for a functional capacity evaluation (FCE), but the therapist stopped the FCE before it was completed. Dr. Pratt testified that the therapist who performed the FCE indicated the results were reflective of what claimant was willing to do, rather than what he was capable of doing. He indicated claimant has some inconsistent responses, including his motor assessment, and that the FCE was not beneficial in determining his objective maximum functional abilities. Dr. Pratt believed that claimant did not cooperate with the therapist.

Dr. Pratt indicated claimant reached maximum medical improvement on October 26, 2009, and restricted claimant from lifting in excess of 20 pounds. He also testified that the restrictions he imposed were based upon the MRI pathology that pre-existed the work injury, and an assumption that most of claimant's symptoms are true.[13]

> Q. (Mr. Burghart) Are there any restrictions necessary as a result of the injury of May 7, 2009?
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> A. (Dr. Pratt) I believe that the restrictions stated were necessary in relationship to the pre-existing changes on the MRI and his symptoms which he reported as a result of the May 2009 event.[14]

Dr. Pratt was not asked if claimant has a permanent functional impairment as a result of his injury. He opined that based upon his restrictions, claimant could not perform 24 of 36 tasks identified by Dr. Robert Barnett, for a 66% task loss. Based upon the tasks Identified by Karen Terrill, Dr. Pratt opined claimant could not perform 53 of 117 tasks for

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[10] Pratt Depo. at 8-9.

[11] *Id.* at 10-11.

[12] *Id.* at 15.

[13] *Id.* at 18-19.

[14] *Id.* at 18.

a 45% task loss. He also indicated claimant can return to work, and is not totally and permanently disabled.

By order of the ALJ, claimant underwent an independent medical examination (IME) by Dr. Vito J. Carabetta. Dr. Carabetta reviewed claimant's medical records, obtained a medical history from claimant and physically examined him. He indicated there was no sciatic tenderness on either side, and that claimant had a negative straight leg test when completed in a seated position, but was positive in a formal supine position. Dr. Carabetta indicated claimant had a Leseague maneuver that was negative bilaterally, Bragard's sign and Patrick's sign were also negative bilaterally. Dr. Carabetta's impression was that claimant has chronic low back pain.

Dr. Carabetta indicated that claimant's subjective complaints greatly outweigh anything that has objectively been determined. Dr. Carabetta opined that pursuant to the AMA *Guides*[15], claimant has a 5% permanent functional impairment to the body as a whole as a result of claimant's back injury of May 7, 2009. He indicated he would defer to Dr. Pratt with regard to any permanent restrictions.[16]

Respondent referred claimant for an examination with Dr. Chris D. Fevurly, an internal and preventive medicine specialist. Dr. Fevurly reviewed claimant's medical records, obtained a medical history from claimant and physically examined claimant on December 10, 2010. He opined that claimant has chronic regional back pain. Dr. Fevurly indicated there is no significant pathology to explain the cause of claimant's lower back pain; there is no evidence for neurogenic compromise, lumbar stenosis, or lumbar radiculopathy; and mild degenerative disc disease as expected in this age group, with a bulging disc at L3-L-4 and L4-L-5. He also indicated the MRI has no probable clinical association with claimant's current low back complaints.

Dr. Fevurly opined claimant suffered a shallow abrasion and a contusion as a result of the May 7, 2009, accident and there was no significant bony abnormality or intra-abdominal abnormality on any imaging study. He testified "I think his current presentation, examination, history and complaints are a manifestation of either severe symptom magnification or, more likely, intentional misrepresentation, malingering."[17] Dr. Fevurly indicated claimant's subjective complaints are tremendously out of proportion to the objective testing.

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[15] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment (*4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[16] Carabetta's IME report (March 29, 2010).

[17] Fevurly Depo. at 13.

Pursuant to the AMA *Guides*, Dr. Fevurly placed claimant in DRE Category II, and assigned a 5% impairment rating to the body as a whole based upon claimant's back injury. Dr. Fevurly indicated that due the duration of claimant's report of chronic back pain and the reports of other doctors, he was required to follow the criteria of the AMA *Guides,* and placed the claimant in DRE Category II. Drs. Pratt and Tramp reported claimant had spasms at the time of his injury.[18] Dr. Fevurly placed no restrictions upon claimant and opined claimant has no task loss.

Two portions of Dr. Fevurly's testimony are significant. The first is as follows:

> Q. (Mr. Rice) Just so there's no confusion here, there's a few questions about your rating. You placed Mr. Smith in DRE Category II, correct?
>
> A. (Dr. Fevurly) I did.
>
> Q. That was based upon subjective - - or actually objective findings from other doctors?
>
> A. That's right.
>
> Q. Fair statement?
>
> A. That's correct.[19]

Later Dr. Fevurly testified in a similar vein:

> Q. (Mr. Rice) Doctor, not to belabor this point, but do - - I don't have the guides in front of me and I'm not sure if we even need them here, but based upon the fourth edition, it doesn't require that you, the examiner, find spasm, does it.
>
> A. (Dr. Fevurly) That's correct.
>
> Q. It simply requires that a physician documents spasm, correct?
>
> A. That's correct. That is correct.
>
> Q. Okay. And that allows DRE II?
>
> A. That's correct.[20]

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[18] *Id.* at 20.

[19] *Id.* at 25.

[20] *Id.* at 28.

Dr. Robert W. Barnett, a job placement specialist, interviewed claimant on May 31, 2010, at the request of claimant's attorney. He reviewed the reports of Dr. Murati, which are not part of the record, and also gathered information regarding claimant's educational background. He indicated that claimant performed 36 distinct tasks in the 43 jobs that claimant held in the 15 years prior to his accident. Dr. Barnett did not have an opinion as to whether claimant is permanently and totally disabled.

At respondent's request vocational counselor, Karen Crist Terrill, interviewed claimant on September 22, 2010. She reviewed the records of Dr. Pratt, Dr. Carabetta, the FCE report, a wage statement and Dr. Barnett's report. Based upon her interview, Ms. Terrill identified 117 distinct tasks claimant performed in the jobs claimant held in the 15 years prior to his accident. She opined that with Dr. Pratt's restrictions, claimant could engage in gainful and substantial employment, and would have a wage loss ranging from 0% through 16%.

Whether claimant suffered a back injury by accident arising out of and in the course of his employment.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[21] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[22]

In order for a claimant to collect workers compensation benefits he must suffer an accidental injury that arose out of and in the course of his employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[23]

The evidence that claimant suffered an accidental back injury while at work on May 7, 2009, is essentially uncontroverted. Claimant testified that while attempting to stand, his back struck a metal circuit breaker panel. Dr. Tramp observed a scratch and

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[21] K.S.A. 2008 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[22] K.S.A. 2008 Supp. 44-501(a).

[23] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

contusion on claimant's back. The physicians that examined claimant disagreed on the nature and extent of his disability. However, Dr. Carabetta and the physicians that testified, opined that claimant suffered a work-related back injury. Therefore, the Board finds claimant suffered a back injury by accident that arose out of and in the course of his employment.

What is the nature and extent of claimant's disability?

Claimant asserts that there is substantial competent evidence to support the ALJ's Award. Respondent argues that claimant is not a credible witness and is grossly misrepresenting his condition. Respondent also alleges the evidence indicates claimant's complaints are not in line with the minimal nature of his accident. Finally, respondent asserts that claimant is not credible and that it is the function of the ALJ, not the doctors to determine the credibility of the claimant. Claimant's credibility is a factor that will be carefully considered by the Board, as ascertaining the credibility of witnesses is an integral part of the fact-finding process.

Dr. Carabetta, appointed by the ALJ to examine the claimant, commented about claimant's subjective complaints. But he did not indicate claimant was magnifying his symptoms, was not credible or was malingering. Dr. Carabetta found claimant suffered a 5% permanent functional impairment to the body as a whole, and placed claimant in DRE Category II.

Dr. Fevurly indicated claimant was engaging in symptom magnification, or was intentionally exaggerating his condition. Yet, after taking this into consideration, he also gave claimant a 5% impairment rating to the body as a whole as a result of his work-related injury, and placed claimant in DRE Category II. According to Dr. Fevurly, two other physicians indicated claimant had a back spasm, which is considered an objective finding pursuant to the AMA *Guides.*

Dr. Pratt, who claimant saw on several occasions as his treating physician, indicated that due to symptom magnification, claimant's physical condition is not as bad as claimant reported. Dr. Pratt was aware claimant did not complete the FCE because of claimant's failure to cooperate with the therapist. He was also aware that claimant had credibility issues, but gave claimant restrictions based, in part, upon symptoms that claimant reported.

Despite questioning claimant's complaints, Drs. Carabetta and Fevurly assigned claimant a permanent impairment as a result of his injury. Respondent argues that it is the function of the trier of fact, not the physicians who examined the claimant, to decide if a claimant is credible. After reviewing all the evidence and taking into consideration claimant's credibility issues, the ALJ concurred with Drs. Carabetta and Fevurly and found

that claimant has a 5% permanent impairment to the body as a whole. This Board affirms the ALJ on this issue.

Whether claimant is entitled to work disability benefits.

Despite the fact that he had misgivings about claimant's subjective complaints, Dr. Pratt restricted claimant from lifting more than 20 pounds, as at least a partial result of claimant's accident. Dr. Pratt gave two task loss opinions of 66% and 45%, for an average task loss of 55.5%. Dr. Fevurly opined claimant suffered no task loss. The ALJ averaged all of the task loss opinions for a 27.7% task loss. Because claimant is not working, the ALJ concluded claimant's has a 100% work loss. Combining the task loss and wage loss, the ALJ determined claimant has a work disability or a permanent partial general impairment rating of 64%.

Dr. Pratt was aware that claimant's subjective complaints were not supported by objective findings. In fact, Dr. Pratt conducted Waddell's testing upon claimant to determine the appropriateness of claimant's complaints. Dr. Pratt concluded that claimant responded inappropriately to four out of five tests. Taking all of these factors into consideration, Dr. Pratt restricted claimant from lifting over twenty pounds, and opined claimant had a significant task loss.

Dr. Fevurly also evaluated claimant's subjective complaints and credibility and came to different conclusions than Dr. Pratt. The ALJ had an opportunity to observe claimant, hear his testimony and weigh his credibility. Understandably, the ALJ concluded the opinions of both doctors are credible. Taking into consideration claimant's credibility issues, the ALJ determined that claimant is permanently partially disabled. The Board concludes that some deference may be given to the ALJ's findings and conclusions because she was able to judge the claimant's credibility by personally observing him testify. By the barest of margins, this Board affirms the ALJ and finds that claimant suffered a 64% work disability.

Whether K.S.A. 2011 Kansas Session Laws, 44-510e(a)(2)(E*)* should be retrospectively applied to this claim.

Respondent's counsel asserted at oral argument that K.S.A. 2011 Kansas Session Laws 44-510e(a)(2)(E) should be applied retroactively to this claim. Claimant's accident (May 7, 2009), the date the record closed (Feb. 3, 2011), and the ALJ's Award (March 1, 2011) took place before K.S.A. 2011 Kansas Session Laws 44-510e(a)(2)(E) were enacted. The ALJ issued her Award on March1, 2011. Respondent's counsel filed his brief with this Board on April 19, 2011, and claimant's counsel filed his brief on May 9, 2011. Thus, the Award and the parties' briefs precede the enactment of K.S.A. 2011 Kansas Session Laws 44-510e(a)(2)(E).

The version of K.S.A. 44-510e in effect on the date of claimant's accident, as interpreted by the Kansas Supreme Court in *Bergstrom,* requires that the average weekly wage of the claimant at the time of the accident be compared to the actual post-accident wages. Under *Bergstrom*, a claimant who is no longer working post-injury generally has a one hundred percent wage loss. K.S.A. 2011 Kansas Session Laws 44-510e(a)(2)(E), which went into effect on May 15, 2011, defines wage loss differently. K.S.A. 2011 Kansas Session Laws 44-510e(a)(2)(E) states:

> "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

If the Board would find that K.S.A. 2011 Kansas Session Laws, 44-510e(a)(2)(E*)* is applicable to the current claim, the factfinder would have to determine claimant's capability to earn post-injury wages and calculate a post-injury average weekly wage. The claimant's wage loss would be the difference between claimant's average weekly wage at the time of his accident and the post-injury average weekly wage he is capable of earning.

If a statutory amendment is considered procedural, it generally applies retroactively. If, on the other hand, the amendment is substantive, then the law in effect at the time of the injury governs the rights and obligations of the parties.[24] An amendment is considered procedural when it concerns the manner and order of conducting lawsuits--the mode of proceeding to enforce legally recognized rights. Substantive amendments establish rights and duties of parties.[25]

The question then becomes whether K.S.A. 2011 Kansas Session Laws, 44-510e(a)(2)(E*)* is substantive or procedural in nature. The Board has addressed in numerous cases, the issue of whether a new statute shall be applied retroactively to a claim.

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[24] *Osborn v. Electric Corp. of Kansas City*, 23 Kan. App. 2d 868, 936 P.2d 297, *rev. denied* 262 Kan. 962 (1997).

[25] *Rios v. Board of Public Utilities of Kansas City*, 256 Kan. 184, 191, 883 P.2d 1177 (1994).

In *Peters,*[26] *Randel*[27] and *Salama*[28] the Board discussed at length whether a statute is substantive or procedural. In *Halley,*[29] the Kansas Supreme court stated:

> On the question of the retrospective application of a statute, we have said:
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> "The general rule of statutory construction is that a statute will operate prospectively unless its language clearly indicates that the legislature intended that it operate retrospectively. This rule is normally applied when an amendment to an existing statute or a new statute is enacted which creates a new liability not existing before under the law or which changes the substantive rights of the parties.
>
> "The general rule of statutory construction is modified where the statutory change is merely procedural or remedial in nature and does not prejudicially affect the substantive rights of the parties.
>
> "While generally statutes will not be construed to give them retrospective application unless it appears that such was the legislative intent, nevertheless when a change of law merely affects the remedy or law of procedure, all rights of action will be enforced under the new procedure without regard to whether or not the suit has been instituted, unless there is a savings clause as to existing litigation."[30]

The Board finds the enactment of K.S.A. 2011 Kansas Session Laws, 44-510e(a)(2)(E*)* is a substantive change in the law. The definition of wage loss has been changed significantly, and affects the substantive rights of parties in workers' compensation claims. K.S.A. 2011 Kansas Session Laws, 44-510e(a)(2)(E*)* requires the factfinder to determine the wages a claimant is capable of earning after his or her injury. Further, the factfinder must consider all factors including, but not limited to, the injured workers' age, physical capabilities, education and training, prior experience and the availability of jobs in the open labor market.

The enactment of K.S.A. 2011 Kansas Session Laws, 44-510e(a)(2)(E*)* has little impact on worker's compensation procedure. Both task loss and wage loss have been redefined in K.S.A. 2011 Kansas Session Laws, 44-510e(a)(2)(E). However, the

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[26] *Peters v. City of Overland Park*, No 268,461, 2007 WL 2296117 (WCAB July 31, 2007).

[27] *Randel v Leroy Perry D/B/A Perry Const.,* No 251,165, 2008 WL 3280288 (WCAB July 31, 2008).

[28] *Salama v. Hen House Market,* No. 1,009,525, 2008 WL 2673163 (WCAB June 30, 2008).

[29] *Halley v. Barnabe,* 271 Kan. 652, 24 P.3d 140 (2001).

[30] *Id.* at 657-58, quoting *Davis v. Hughes*, 229 Kan. 91, 101, 622 P.2d 641 (1981),quoting and *Nitchals v. Williams*, 225 Kan. 285, Syl. ¶ 1-3, 590 P.2d 582 (1991); see also *Ripley v. Tolbert*, 260 Kan. 491, 921 P.2d 1210 (1996); *Lakeview Village, Inc. v. Board of Johnson County Comm'rs*, 232 Kan. 711, 659 P.2d 187 (1983).

procedure of calculating work disability, by averaging task loss and wage loss, is unchanged.

In *Halley,* the court indicated that the general rule of statutory construction is that a statute will operate prospectively unless its language clearly indicates that the legislature intended it to operate retroactively. There is no language in K.S.A. 2011 Kansas Session Laws, 44-510e(a)(2)(E*)* that indicates the legislature intended it to operate retroactively. Simply put, the Board finds that K.S.A. 2011 Kansas Session Laws, 44-510e(a)(2)(E*)* should not be applied retroactively to this claim.

AWARD

WHEREFORE, the Board affirms the March 1, 2011, Award entered by ALJ Sanders.

IT IS SO ORDERED.

Dated this ____ day of July, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Matthew L. Bretz, Attorney at Law
Rebecca A. Sanders, Administrative Law Judge